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No. 16A-1191

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Applicants,

v.

STATE OF HAWAII, *et al.*,

Respondents.

RESPONSE TO APPLICATION FOR STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT 3

ARGUMENT 10

I. THIS COURT IS UNLIKELY TO VACATE THE INJUNCTION 11

A. The Challenge To The Order Is Justiciable 12

1. Dr. Elshikh Has Standing 13

2. Hawaii Has Standing 16

3. The Order Is Otherwise Reviewable 19

B. The Order Violates The Establishment Clause 19

1. *Mandel* Does Not Exempt The Order From Meaningful Constitutional Review 20

2. The Establishment Clause Forbids The President From Enacting A Thinly Veiled Muslim Ban 24

C. The Order Exceeds The President's Authority Under § 1182(f) 28

1. The President May Not Use General Grants Of Authority To Override Carefully-Reticulated Statutory Schemes 28

2. The Order Repeatedly Subverts Existing Statutory Authority 30

II. THE EQUITIES WEIGH AGAINST STAYING THE INJUNCTION 33

III. THE SCOPE OF THE INJUNCTION IS PROPER 38

CONCLUSION 40

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. *Wright*,
468 U.S. 737 (1984) 15

Ass'n of Data Processing Serv. Orgs., Inc. v. *Camp*,
397 U.S. 150 (1970) 13

Bank of Am. Corp. v. *City of Miami*,
137 S. Ct. 1296 (2017) 17

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*,
508 U.S. 520 (1993) 26, 39

Commodity Futures Trading Comm'n v. *British Am. Commodity Options Corp.*,
434 U.S. 1316 (1977) (Marshall, J., in chambers) 34

Conkright v. *Frommert*,
556 U.S. 1401 (2009) (Ginsburg, J., in chambers) 11

Czyzewski v. *Jevic Holding Corp.*,
137 S. Ct. 973 (2017) 17

Dayton Bd. of Educ. v. *Brinkman*,
439 U.S. 1358 (1978) (Rehnquist, J., in chambers) 33

Edwards v. *Aguillard*,
482 U.S. 578 (1987) 25, 26

Elrod v. *Burns*,
427 U.S. 347 (1976) 38

Engel v. *Vitale*,
370 U.S. 421 (1962) 3

FDA v. *Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000) 28

Franklin v. *Massachusetts*,
505 U.S. 788 (1992) 40

Gonzales v. *Oregon*,
546 U.S. 243 (2006) 28

Gratz v. *Bollinger*,
539 U.S. 244 (2003) 14

Honeycutt v. *United States*,
No. 16-142, slip op. (U.S. June 5, 2017) 28

INS v. *Legalization Assistance Project*,
510 U.S. 1301 (1993) (O'Connor, J., in chambers) 10

IRAP v. *Trump*,
No. 17-1351, slip op. (4th Cir. May 25, 2017) 31, 32

Judulang v. *Holder*,
565 U.S. 42 (2011) 31

Kerry v. *Din*,
135 S. Ct. 2128 (2015) 19, 21, 30

Kleindienst v. *Mandel*,
408 U.S. 753 (1972) ..... *passim*

United States ex rel. Knauff v. *Shaughnessy*,
338 U.S. 537 (1950) 29

Korematsu v. *United States*,
323 U.S. 214 (1944) 32

Krause v. *Rhodes*,
434 U.S. 1335 (1977) (Stewart, J., in chambers) 11

Lee v. *Weisman*,
505 U.S. 577 (1992) 13

Li Hing of Hong Kong, Inc. v. *Levin*,
800 F.2d 970 (9th Cir. 1986) 19

Locke v. *Davey*,
540 U.S. 712 (2004) 13

Maryland v. *King*,
133 S. Ct. 1 (2012) (Roberts, C.J., in chambers) 34, 37

Massachusetts v. *EPA*,
549 U.S. 497 (2007) 16

Mathews v. *Diaz*,
426 U.S. 67 (1976) 29

McCreary Cty., Ky. v. *Am. Civil Liberties Union of Ky.*,
545 U.S. 844 (2005) 24, 27

McGowan v. *Maryland*
366 U.S. 420, 429 (1961) 18

Nat'l League of Cities v. *Brennan*,
419 U.S. 1321 (1974) (Burger, C.J., in chambers) 34

In re Navy Chaplaincy,
534 F.3d 756 (D.C. Cir. 2008) 15

Rostker v. *Goldberg*,
453 U.S. 57 (1981) 19

Ruckelshaus v. *Monsanto Co.*,
463 U.S. 1315 (1983) (Blackmun, J., in chambers) 33, 37

Saavedra Bruno v. *Albright*,
197 F.3d 1153 (D.C. Cir. 1999) 19

Sale v. *Haitian Centers Council, Inc.*,
509 U.S. 155 (1993) 29

Santa Fe Indep. Sch. Dist. v. *Doe*,
530 U S. 290 (2000) 13, 24, 38

Sch. Dist. of Abington Twp. v. *Schempp*,
374 U.S. 203 (1963) 13, 14

Stormans, Inc. v. *Wiesman*,
136 S. Ct. 2433 (2016) 25

Texas v. *United States*,
787 F.3d 733 (5th Cir. 2015) 35

Texas v. United States,
809 F.3d 134 (5th Cir. 2016) 40

Town of Greece v. Galloway,
134 S. Ct. 1811 (2014) 13, 18, 24

United States Dep't of Defense v. *Meinhold*,
510 U.S. 939 (1993) 39

United States v. *Witkovich*
353 U.S. 194, 199-202 (1957) 29

Valley Forge Christian Coll. v. *Ams. United for Separation of Church & State, Inc.*,
454 U.S. 464 (1982) 15, 16

Van Orden v. *Perry*,
545 U.S. 677 (2005) 13, 18

W. Va. State Bd. of Educ. v. *Barnette*,
319 U.S. 624 (1943) 23, 24

Washington v. *Seattle Sch. Dist. No. 1*,
458 U.S. 457 (1982) 27

Washington v. *Trump*,
2017 WL 1045950 (W.D. Wash. Mar. 16, 2017) 36

Washington v. *Trump*,
2017 WL 462040 (W.D. Wash. Feb. 3, 2017) 5

Washington v. *Trump*,
847 F.3d 1151 (9th Cir. 2017) 6, 38, 40

Whitman v. Am. Trucking Ass'n,
531 U.S. 457 (2001) 20

Wong Wing Hang v. *INS*,
360 F.2d 715 (2d Cir. 1966) 31

Zadvydas v. *Davis*,
533 U.S. 678 (2001) 29, 38

Zelman v. *Simmons-Harris*,
536 U.S. 639 (2002) 18

Zemel v. *Rusk*,
381 U.S. 1 (1965) 28

Constitution, Statutes, Regulations, and Executive Materials

U.S. Const. art. I, § 8, cl. 4 ..... 28, 39

8 U.S.C. § 1152(a)(1)(A) 32

8 U.S.C. § 1182(a)(3)(B) 30

8 U.S.C. § 1182(a) 31

8 U.S C. § 1182(a)(3)(B)(i)(II) 30

8 U.S.C. § 1182(f) ..... *passim*

8 U.S.C. § 1187(a)(12) 30

45 C.F.R. part 400 17

82 Fed. Reg. 20956 (May 4, 2017) 12

Proclamation No. 2523, 55 Stat. 1696 (Nov. 14, 1941) 29

Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017) ..... *passim*

Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) 4

9 FAM § 302.14-3(B) 31

H.R. Rep. No. 100-475 (1987) 30

Other Authorities

Barbara J. Van Arsdale et al., Federal Procedure, Lawyers Edition § 3:304, Westlaw (June 2017 Update) 11

Christine Wang, *Trump website takes down Muslim ban statement after reporter grills Spicer in briefing*, CNBC (May 8, 2017) 9

Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* (Jan. 23, 2017) 29

Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realdonaldtrump 10

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) 22

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INTRODUCTION

Almost three months ago, the U.S. District Court for the District of Hawaii enjoined provisions of an Executive Order that would have banned millions of individuals from the United States. Had the Order gone into effect, it would have separated families, disturbed countless plans for international work, research, and study, and prevented thousands of persecuted individuals from finding a safe harbor in the United States. As a result, it would have forced respondent Dr. Elshikh and numerous other Muslim residents of the State of Hawaii to endure the absence of loved ones; it would have hurt the diversity and depth of talent in Hawaii's University and workplaces; and it would have done lasting damage to Hawaii's reputation as a place of welcome and refuge

These consequences, by themselves, are staggering. They are made worse by the near universal perception that the Order's travel and refugee bans were designed primarily to fulfill the President's unconstitutional campaign promise to enact a Muslim ban And they are made worse still by the fact that the President himself has cultivated that perception.

Our foundational text, the First Amendment, bars the Government from making a citizen's status in the political community dependent on his faith. The President unquestionably violates that command when he issues an Order that disproportionately burdens Muslim-Americans, while denigrating the Muslim faith and making it abundantly clear that the Order's harmful effect on Muslims is far from incidental. To date, the injunction has prevented that constitutional violation.

In doing so, it has safeguarded religious liberty and demonstrated the strength of our Constitution and the courts that protect it.

Nonetheless, the Government now asks this Court to stay the injunction, asserting an urgent need to implement the bans in order to avoid irreparable harm. But the Government's own actions belie this assertion. At every turn, the Government has opted to delay rather than accelerate judicial review: After the first Order was enjoined, the Government waited a month to introduce a revised Order, with some of that delay motivated by a desire to take advantage of a favorable news cycle. When the second Order, too, was enjoined, the Government eschewed any immediate appeal or even any request for a stay, instead spending weeks relitigating the issues before the District Court. And, when the Government finally did seek relief from the Ninth Circuit, it proposed a schedule that would virtually ensure that the court of appeals would not decide the Government's stay request before the merits. These are not the actions of a Government that believes the immediate implementation of its Order is necessary to avoid irreparable harm.

The Government offers no explanation for this profound disjunction between its call for urgency and its dilatory litigation conduct. Instead, the Government implicitly asks the Court turn a blind eye to the evidence that undermines its stay request, just as it explicitly asks the Court to ignore the evidence of an unconstitutional purpose that undermines the Order itself.

The Court should do neither. Staying the injunction would irreparably injure respondents and thrust the country back into the chaos and confusion that resulted

when the first Order was announced. The long term consequences would be even more significant. As soon as the unconstitutional Order is implemented, our Framers' greatest fears for this Nation will be realized; the Order will serve as an ominous "Beacon on our Coast, warning" the "persecuted and oppressed of every Nation and Religion" that they must "seek some other haven." *Engel* v. *Vitale*, 370 U.S. 421, 432 n.16 (1962) (quoting James Madison, Memorial and Remonstrance against Religious Assessments (June 20, 1785)).

The stay in this case should be denied. Likewise, the Government's request for a stay and certiorari in *Int'l Refugee Assistance Project ("IRAP")* v. *Trump*, Nos. 16-11A91 and 16-1436, should be denied. However, should the Court grant certiorari in *IRAP* v. *Trump*, respondents acquiesce in the Government's alternative request to grant certiorari before judgment so that the cases may be heard together.

STATEMENT

1. In December 2015, then-candidate Donald Trump made the exclusion of Muslims a core plank of his presidential campaign platform. He issued a public statement calling for "a total and complete shutdown of Muslims entering the United States." C.A. E.R. 59, 144 & S.E.R. 15, 156. When Mr. Trump was asked how this policy would be implemented at the border, he explained that the person seeking entry would be asked, "are you Muslim?," and "if they said 'yes,' they would not be allowed into the country." C.A. E.R. 145. In an interview on March 9, 2016, he explained his rationale: "I think Islam hates us * * *. [W]e can't allow people

coming into this country who have this hatred of the United States * * * [a]nd of people that are not Muslim." Stay Application Addendum ("Add.") 57.

While campaigning, Mr. Trump also decried the admission of Muslim refugees. As early as June 2015, he complained that "Islamic" refugees from Syria were being admitted to the United States, but "Christian" refugees were not. C.A. E.R. 144. In June 2016, he said his opponent would "admit[] hundreds of thousands of refugees from the Middle East" who would "try[] to take over our children and convince them * * * how wonderful Islam is." C.A. E.R. 146 n.19.

As the campaign progressed, Mr. Trump sometimes began to couch the "total and complete shutdown of Muslims" in different terms, characterizing it as a ban on immigration from countries "where there's a proven history of terrorism." C.A. E.R. 144. But when asked in July 2016 whether this approach represented a "rollback" of his Muslim ban, he disagreed: "In fact, you could say it's an expansion." C.A. E.R. 146. Mr. Trump explained, "I'm looking now at territories" because "[p]eople were so upset when I used the word Muslim. Oh, you can't use the word Muslim." C.A. E.R. 146-147. When asked on December 21, 2016, now as President-Elect, whether he had decided to "rethink" his "plans to create a Muslim registry or ban Muslim immigration," his answer was: "You know my plans." C.A. E.R. 147.

2. On January 27, 2017, seven days after taking office, President Trump signed Executive Order No. 13,769 (the "Order"), entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." 82 Fed. Reg. 8977 (Feb. 1,

2017). As he signed it, he read the title, looked up, and said: "We all know what that means." C.A. E.R. 148.

The first Order imposed an immediate, 90-day ban on entry by nationals of seven "overwhelmingly Muslim" countries. Add. 55, 69. The Order also suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days, lowered the cap on annual refugee admissions, and indefinitely barred Syrian refugees. Add. 70. The USRAP suspension included a targeted carve-out for refugees who were "religious minorit[ies]" in their home countries. *Id.* In an interview with the Christian Broadcasting Network on the day the Order was signed, President Trump explained that this latter provision was designed to "help" Christians, falsely asserting that in the past "[i]f you were a Muslim [refugee] you could come in, but if you were a Christian, it was almost impossible." C.A. E.R. 150.

One of President Trump's advisors was explicit about the relationship between the Order and the promised "Muslim ban." In a television interview the day after the Order was signed, Rudolph Giuliani recounted: "When [Donald Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally." C.A. E.R. 150-151.

The first Order spurred confusion and chaos. Over 100 individuals were immediately detained at U.S. airports, and the Government revoked 60,000 visas during the first week. C.A. E.R. 152-154. Numerous lawsuits were filed and within a week, a Washington district court enjoined the Order's enforcement nationwide. *Washington* v. *Trump*, 2017 WL 462040, at **2-3 (W.D. Wash. Feb. 3, 2017). The

Ninth Circuit denied the Government's request to stay the district court's injunction in a published, unanimous decision. 847 F.3d 1151, 1169 (9th Cir. 2017).

3. The Government did not appeal the Ninth Circuit's decision; instead, it decided to issue a "revised" Order. C.A. E.R. 155. In the words of President Trump's senior advisor, Stephen Miller—appearing in a television interview on February 21, 2017—the revised Order would "have the same basic policy outcome" as the first, and any changes would address "very technical issues that were brought up by the court." C.A. E.R. 156.

As the new Order was being prepared, the Department of Homeland Security ("DHS") issued internal memoranda severely undermining its purported national security rationale. For example, on February 24, 2017, a draft DHS report concluded that "country of citizenship" was an "unreliable indicator of terrorist threat[s] to the United States." C.A. S E.R. 158; *see also* C.A. E.R. 151.

Undeterred, the White House planned to release its revised Order on March 1, 2017, but delayed the announcement to avoid "undercut[ting] the favorable coverage" of President Trump's speech to Congress. C.A. E.R. 157. The Order was finally issued on March 6, 2017. Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017). As Mr. Miller had promised, its substance is largely unchanged from the first. Section 2(c) now bans nationals of six (rather than seven) overwhelmingly Muslim countries—specifically, countries whose Muslim populations range from 90.7% to 99.8%—from "entry into the United States" or being "issu[ed] a visa" for a period of 90 days. Order §§ 2(c), 3(c); Add. 55. Individuals who are present in the

United States on the Order's effective date or who already have been granted visas or lawful status are exempt; otherwise, nationals of the six countries may escape the ban only by obtaining a wholly discretionary, "[c]ase-by-case waiver." *Id.* § 3(a)-(c). The Order also instructs the Secretary of Homeland Security to conduct a "worldwide review" to determine whether the President's ban should be extended to "additional countries." *Id.* § 2(a)-(b), (d)-(g).

The Order retains the President's refugee ban, as well. Section 6(a) suspends all "travel of refugees into the United States" as well as all "decisions on applications for refugee status" for 120 days. Section 6(b) lowers the cap on refugees that may be admitted to the United States in 2017 from 110,000 to 50,000. Although the Order no longer contains an explicit preference for Christian refugees, it permits Administration officials to exempt and thus admit individuals as refugees "on a case-by-case basis, in their discretion." *Id.* § 6(c).

4. The issuance of the revised Order rekindled the numerous legal challenges that had been lodged against the first Order. Respondents, the State of Hawaii and Dr. Elshikh, had filed one of those suits against the original Order in the U.S. District Court for the District of Hawaii. Proceedings were stayed after that Order was enjoined, but the stay was lifted once the revised Order was announced.

On March 8, two days after the second Order was announced, respondents filed a Second Amended Complaint and a motion for a temporary restraining order ("TRO") barring implementation of the revised Order. On March 15, 2017, the District Court issued a TRO, enjoining the Government from "implementing

Sections 2 and 6 of the Executive Order across the Nation." Add. 66. The court found that both Plaintiffs had standing because each alleged "direct, concrete injuries" to their *own* interests: Hawaii demonstrated "two proprietary injuries stemming from" the Order's effects on its University and tourism economy, and Dr. Elshikh showed that the Order frustrates his ability to freely practice his religion, raise his children in the Muslim faith, and reunite with his own mother-in-law. Add. 41-45, 47-48. On the merits, the court found that "[a]ny reasonable, objective observer would conclude * * * that the stated secular purpose of the Executive Order is, at the very least, 'secondary to a religious objective' of temporarily suspending the entry of Muslims." Add. 60. The court "expresse[d] no view on Plaintiffs' due-process or INA-based statutory claims." Add. 53 n.11.

After a second hearing, on March 29, 2017, the court granted respondents' motion to convert the TRO into a preliminary injunction. The court reaffirmed respondents' standing and the Establishment Clause violation, and again reserved the statutory and Due Process questions. Add. 8-17. The court also declined to narrow the scope of the injunction, explaining that "the *entirety* of the Executive Order runs afoul of the Establishment Clause" and, in any event, the Government had "fail[ed] to provide a workable framework for narrowing the scope of the enjoined conduct." Add. 20-22 (emphasis added). The court also noted the Government's own concession that "'an internal review of [vetting] procedures obviously can take place independently of the 90-day suspension-of-entry provision." Add. 22 (citing Gov't Mem. in Opp'n to Prelim. Inj. 28).

The Government appealed the District Court's preliminary injunction and moved for a stay pending appeal. The Government did not ask for an immediate ruling on the stay. Instead, it proposed a month long briefing schedule under which the stay and the merits briefing would occur simultaneously.

On May 15, 2017, a panel of the Ninth Circuit heard oral argument. The panel has not yet ruled on the stay request or on the merits. Nevertheless, on June 2, the Government asked this Court to issue a stay of the District Court's injunction, claiming urgency as a result of the Fourth Circuit's ruling.

5. Throughout these judicial proceedings, the President has continued to make generalized, often inflammatory, statements about the Muslim faith and its adherents. On the night that his revised Order was enjoined, President Trump publicly reiterated his view that it is "very hard" for Muslims to assimilate into Western culture. C.A. S.E.R. 95. Several weeks later, at a White House gathering for conservative media outlets, he said that Muslim refugees had been favored over Christians, and that his Administration would help the Christians.[1] And, until minutes before the oral argument in the related Fourth Circuit proceedings, President Trump's regularly-updated campaign website continued to feature his campaign statement calling for a "total and complete shutdown of Muslims entering the United States."[2] *See* C.A. E.R. 156.

The President has also expressed skepticism of the revised Order, his legal

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[1] Scott Johnson, *At the White House with Trump*, PowerlineBlog.com (Apr. 25, 2017), goo.gl/ZeXqhY.

[2] Christine Wang, *Trump website takes down Muslim ban statement after reporter grills Spicer in briefing*, CNBC (May 8, 2017), goo.gl/j0kpAi.

strategy, and the courts themselves. Just hours after the Hawaii District Court issued its nationwide injunction, the President complained to a rally of his supporters that the new Order was just a "watered down version of the first one" and had been "tailor[ed]" at the behest of "the lawyers." C.A. S.E.R. 84. He added: "I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place." C.A. S.E.R. 84. In addition, he called the District Court's opinion a "terrible ruling" done "for political reasons," and criticized the "much overturned Ninth Circuit Court." C.A. S.E.R. 82-84.

On June 5, 2017, days *after* the Government filed its stay application in this Court, President Trump echoed these sentiments in a series of Twitter posts championing the "original Travel Ban." He decried how the "Justice Dep[artment]" had submitted a "watered down, politically correct version * * * to S.C." He urged the Justice Department to seek "an expedited hearing of the watered down Travel ban before the Supreme Court," and to "seek [a] much tougher version." Finally, he claimed that "[t]he courts are slow and political," but that his Administration was already "EXTREME VETTING people coming into the U.S."[3]

ARGUMENT

The Government is not entitled to the extraordinary remedy of a stay from this Court. The Supreme Court "rarely grant[s]" a stay before the lower court has decided the merits, *INS* v. *Legalization Assistance Project*, 510 U.S. 1301, 1302

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[3] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, posts uploaded between 6:25 A.M. E.S.T. and 6:44 A.M. E.S.T.), https://twitter.com/realdonaldtrump.

(1993) (O'Connor, J., in chambers), and it almost always denies a stay when the lower courts have not yet ruled on that request. *See, e.g.*, *Krause* v. *Rhodes*, 434 U.S. 1335, 1335-36 (1977) (Stewart, J., in chambers); *see also* Barbara J. Van Arsdale et al., Federal Procedure, Lawyers Edition § 3:304, Westlaw (June 2017 Update) ("While an application for a stay is pending in the lower court, a similar application will normally be denied by the Supreme Court Justice."). There is no reason to depart from that practice here. That is particularly so because granting the Government's stay and hearing the case in October, as the Government requests, would effectively grant the Government a victory on the merits. Absent the injunction, the Government will have imposed the full travel ban and most of the refugee ban before the October Term begins.

The timing of the request, however, is the least of the Government's problems. In order to obtain a stay, the Government must demonstrate both that the Court is likely to vacate the injunction, and that the harm the Government will suffer absent a stay outweighs the harm a stay will inflict on respondents and the public. The weakness of the Government's case makes that impossible. *See, e.g.*, *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers).

I. THIS COURT IS UNLIKELY TO VACATE THE INJUNCTION

As a preliminary matter, it is doubtful that the Court will even grant review in this case. Respondents do not dispute the fundamental importance of the underlying legal issues, which involve the breadth of religious freedom and the statutory and constitutional limits on Executive power. The underlying facts,

however, suggest that review is unnecessary. The President first asserted a need for an immediate, temporary ban almost five months ago, explaining that the ban would facilitate a review and upgrade of the country's immigration vetting procedures. In May, the Government published a notice in the Federal Register, announcing improvements to the vetting procedures worldwide. *See* 82 Fed. Reg. 20956 (May 4, 2017). And, even after this stay application was filed, the President confirmed that the country was already engaged in "EXTREME VETTING." *See supra* p. 10 & n.3. Thus, by the Government's own account, the need for the travel and refugee bans has passed. It would be unnecessary and wasteful for this Court to grant review of an issue that is effectively moot. *See also infra* pp. 35-37 (explaining that the existing injunctions do not prevent an upgrade of the vetting procedures).

Further, if the Court does grant review, it is extremely unlikely to vacate the injunction. The Government's argument to the contrary relies primarily on its assertion that the lower court should not have reached the constitutional question, either because the challenge is not justiciable or because courts must apply a highly deferential standard of review. The Government is wrong on both counts. On the merits, the injunction must be sustained both because the Order is plainly unconstitutional and because it exceeds the President's statutory authority.

A. The Challenge To The Order Is Justiciable.

The Government first alleges that the injunction will be overturned because this case is not justiciable. But there is no obstacle to judicial review. Dr. Elshikh

and the State of Hawaii both have standing, and the so-called "doctrine of consular unreviewability" is inapplicable.

1. Dr. Elshikh Has Standing.

a. Because of the Constitution's core protections for religious freedom, a policy that demeans or denigrates a person's faith necessarily inflicts an "important * * * constitutional injur[y]." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S 290, 292 (2000). Thus, at least when a government establishment of religion "directly affect[s]" a person, the resulting spiritual or dignitary harm confers standing. *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963); *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 157 (1970). Indeed, "[t]he indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial." *Locke* v. *Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting).

Accordingly, this Court has found standing even with respect to Establishment Clause injuries that might appear slight. For example, the Court has indicated that observing a "benediction" at one's high school graduation, *Lee* v. *Weisman*, 505 U.S. 577, 584-85 (1992), "encounter[ing]" the Ten Commandments on "Capitol grounds," *Van Orden* v. *Perry*, 545 U.S. 677, 682-83 (2005) (plurality op.), and taking "'offens[e]'" at a prayer during a "town board meeting[]," *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1817 (2014), are all injuries sufficient to give rise to standing.

b. Under these principles, Dr. Elshikh's standing is obvious. The Order, which is widely perceived as a Muslim ban, denigrates and demeans Dr. Elshikh's faith. It has therefore "devastat[ed]" Dr. Elshikh, his family, and his mosque. C.A. E.R. 94, 96, 161-162. And the religious discrimination embodied in the Order "directly affect[s]" Dr. Elshikh in several ways. *Schempp*, 374 U.S. at 224 n.9.

First, the Order directly impedes Dr. Elshikh's ability to reunite his family. Dr. Elshihk's mother-in-law is a Syrian national seeking an immigrant visa. C.A. E.R. 94-95. She had a consular interview last month at the U.S. Embassy in Lebanon, and received a letter dated May 24, 2017, informing her that her visa application "requires administrative processing," which "takes an average of 60 days."[4] The travel ban, if it goes into effect, would block her entry into the United States. This injury alone is sufficient to confer standing, even independent of the dignitary harm Dr. Elshikh has suffered. And the Government is incorrect that this injury is unripe because Dr. Elshikh's mother-in-law might receive a waiver. The process of seeking a waiver would undoubtedly prolong the family separation, and, in any event, "denial of equal treatment resulting from the imposition of [a] barrier" is itself an injury, regardless of whether it results in the "ultimate inability to obtain [a] benefit." *Gratz* v. *Bollinger*, 539 U.S. 244, 262 (2003).

Second, Dr. Elshikh is directly affected because he is the imam of a mosque whose religious community is damaged by the Order. Because the Order casts opprobrium on Muslims, it engenders feelings of fear and condemnation in the

[4] Because this letter was received so recently, it is not yet in the record. If the Court desires, respondents can lodge a copy under Supreme Court Rule 32.3.

members of Dr. Elshikh's mosque. C.A. E.R. 96; 131-132. Moreover, at least one current member of Dr. Elshikh's mosque is a refugee, and the community is generally enriched by the presence of refugees worshipping there. Br. of *Amicus Curiae* Dr. Ismail Elshikh at 11, *IRAP* v. *Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 146-1; C.A. E.R. 131-132. If the Order is implemented, Dr. Elshikh will be the spiritual leader of a denigrated and diminished religious community.

c. The Government suggests that these harms to Dr. Elshikh are not cognizable because they do "not result from any alleged discrimination against *him*." Appl. for Stay Pending Appeal at 22 ("Stay Appl."). That is simply not true. The Order discriminates directly against Dr. Elshikh by denigrating the faith *he* professes, by excluding *his* mother in law, and by harming *his* mosque and its members. In other words, by targeting Muslims for exclusion, the Order "denie[s] equal treatment" to Dr. Elshikh himself. *See Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (citation omitted).

Finally, the Government attempts to dismiss Dr. Elshikh's injury by alleging that it is comparable to the one this Court held insufficient in *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). That fundamentally misunderstands Dr. Elshikh's harm in two ways. *First*, in *Valley Forge*, the plaintiffs challenged a land transfer that gave preference to a religious group. *Id.* at 468; *see also In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008) (challenge to retirement system that "favor[ed] Catholic chaplains"). There is a marked difference between challenging a government action

that confers a benefit on someone else (which is at best a generalized grievance shared by all who do not receive the preference), and Dr. Elshikh's challenge to an Order that imposes burdens on himself (which is the kind of direct, personalized injury that traditionally supports standing). *Second*, the plaintiffs in *Valley Forge* alleged that they experienced "psychological" harm from "the observation of conduct with which [they] disagree[d]." 454 U.S. at 485. Dr. Elshikh's injury is not that he simply "disagrees" with the Order; it is that the Order condemns his faith and harms his family and his mosque.

2. Hawaii Has Standing.

Hawaii, too, has standing to challenge Sections 2 and 6 of the Order, particularly in light of the "special solicitude" States receive "in the standing analysis." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007).

a. First, Hawaii has standing because of the harm to its ability to recruit and retain faculty and students from overseas. The University of Hawaii has 23 graduate students, multiple faculty members, and 29 visiting faculty from the six designated countries. C.A. E.R. 120-121. The University has made fourteen offers of admission to graduate students located in the six countries targeted by the Order, and three of those students have accepted their offers of admission. Second Suppl. Decl. of Risa E. Dickson ¶¶ 3-5, C.A. Dkt. No. 307-2. One of those three students must be on campus by August 1, 2017, and another must be on campus by August 10, 2017. *Id.* ¶ 7. Classes begin on August 21, 2017. *Id.* ¶ 6. If the Order goes into

effect, those students will be unable to matriculate, and the University will lose the tangible and intangible benefits that their enrollment would have conferred.

Second, Hawaii will lose tax revenue as a result of the drop in tourism. *See Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1303 (2017) ("lost tax revenue" is an Article III injury). As the District Court found, "preliminary data" suggests that during the short period of time that the first Executive Order was in place, the number of visitors to Hawaii from the Middle East fell. Add. 10, 44-45. More recent numbers on the Hawaii Tourism Authority's website confirm this trend. C.A. Answering Br. at 20 n.6 (citing *Visitor Arrivals from Middle East & Africa*, Hawaii Tourism Authority, goo.gl/tM6krh). That financial harm alone is more than sufficient to establish standing. *See Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("[E]ven a small amount of money is ordinarily an 'injury.'").

Third, the Order prevents the State from resettling refugees within its borders. C.A. E.R. 166. Hawaii has already accepted three refugees this year, and it intends to accept more. *See* Decl. of Lawrence E. Bartlett, C.A. E.R. 165-166. Refugees pay taxes and contribute to Hawaii's economy. Moreover, by blocking the admission of refugees, the Order deprives the State of financial assistance it would otherwise receive from the Federal Government for each refugee it admits. 45 C.F.R. part 400. And by preventing the State from carrying out its resettlement program, the Order inflicts a concrete injury on the State as sovereign.

Finally, Hawaii has standing because the Order effects a federal establishment of religion. A core function of the Establishment Clause is to

"protect[] *States* * * * from the imposition of an established religion by the Federal Government." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (emphasis added); *Van Orden*, 545 U.S. at 731 n.32 (Stevens, J., dissenting, joined by Ginsburg, J.). The Clause has long protected the sovereign right of states to include protections for religious freedom within their state constitutions. *Town of Greece*, 134 S. Ct. at 1836 (Thomas, J., concurring) ("the decision to establish *or disestablish* religion was reserved to the States" (emphasis added)). Hawaii's Constitution contains such a provision, C.A. E.R. 141, 163-164; if the Order goes into effect, it will undermine that guarantee and inflict precisely the sort of injury the Establishment Clause was created to prevent.

b. The Government's main response (at 21) is to dispute whether the State's proprietary injuries are themselves sufficient to create standing. That is beside the point, given the direct harms the Order inflicts on the State's sovereign interests. In any event, the Government is wrong. In *McGowan* v. *Maryland*, plaintiffs "allege[d] only economic injury to themselves" without "any infringement of their own religious freedoms." 366 U.S. 420, 429 (1961). While that was not enough to make out a *free exercise* claim—the only part of the opinion cited by the Government here (at 22)—it *was* enough for Establishment Clause standing. That was because the Framers "feared" an "establishment of religion" not just because it would interfere with religious exercise but "because of its tendencies to political tyranny and subversion of civil authority." *McGowan*, 366 U.S. at 430.

3. The Order Is Otherwise Reviewable.

The Government also claims (at 20) that the "doctrine of consular nonreviewability" blocks judicial review of the Order. This Court has never embraced that doctrine, but, even as articulated by lower courts, the doctrine has no application here. Plaintiffs are not challenging an individual consular decision. *Cf. Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999); *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986). They are challenging a broad policy that injures American citizens and States. This Court has not hesitated to review Government actions involving the issuance and denial of visas when the rights of Americans are implicated. *Kerry* v. *Din*, 135 S. Ct. 2128 (2015); *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972). Moreover, the Government's assertion of consular nonreviewability would mean that even an Executive Order *expressly* banning all Muslims from the country, or banning all members of a particular race, would be entirely insulated from judicial review. That simply cannot be. While deference to the political branches in the arena of immigration is appropriate, "deference does not mean abdication." *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981).

B. The Order Violates The Establishment Clause.

Even when it reaches the merits, the Government's primary argument is that the injunction must be vacated because courts should not engage in any meaningful analysis of the Order's constitutionality. The Government urges that the Order must be upheld because it has asserted a "facially legitimate and bona fide" rationale for the bans. *Mandel*, 408 U.S. at 770. That is incorrect.

1. *Mandel* Does Not Exempt The Order From Meaningful Constitutional Review.

a. According to the Government, courts must evaluate the Order under the highly deferential standard of review announced in *Mandel*, a case involving an individual exclusion decision. This argument suffers from the same defect as the Government's assertion of consular nonreviewability: It assumes the deference owed to an Executive's decision to exclude an individual alien is equally applicable to a sweeping Executive policy excluding millions of aliens. That is a dubious proposition, given that the Court has long distinguished between the nearly absolute deference required for exercises of prosecutorial discretion and the far more limited deference owed to broad Executive Branch policymaking. *See, e.g. Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 475 (2001) ("[T]he degree of * * * discretion that is acceptable varies according to the scope of the power congressionally conferred.").

b. More importantly, the Order cannot pass muster even under *Mandel*. In *Mandel*, the Court declined to consider the constitutionality of an Executive decision in the immigration context because the Government had offered a "facially legitimate and bona fide" rationale for its exercise of discretion. 408 U.S. at 770. The Government attempts to read the words "bona fide" out of the opinion, urging that the *Mandel* standard is met whenever it offers a plausible rationale that the challenged policy *could* serve. But *Mandel* listed two requirements, not one. Even when the Government has offered a "facially legitimate" reason for an immigration decision, the Court must still conduct a more thorough review of the

constitutionality of the policy if the plaintiff is able to make "an affirmative showing of bad faith." *Din*, 135 S. Ct. at 2140-41 (Kennedy, J., concurring in the judgment).

Here, Plaintiffs are easily able to make that showing. There is a mountain of extrinsic evidence, mostly in the form of statements by the President himself, indicating that the stated rationale is a sham. That includes multiple public statements from Candidate Trump describing Islam in general and Muslim refugees in particular as a threat, and a formal, published campaign statement calling for a complete ban on Muslim immigration. It also includes statements by the Candidate explaining that—in response to criticism—he has decided to stop talking "Muslim" and start talking "territory," as well as his clarification that this is not a "roll back" but, if anything, an "expansion" of his promised Muslim ban. And it includes numerous post-inauguration statements in which the President has emphasized that he is fulfilling his campaign promises, admitted a desire to favor Christian refugees over Muslims, and acknowledged that the current Order is largely an attempt by his lawyers to "water[-]down" the travel ban he originally proposed in order to make it "politically correct." *See supra* p. 10.

c. The Government contends that *Mandel* requires courts to ignore *all* of this evidence In its view, so long as the policy set out within the four corners of the Order passes rational basis review, the Court may not even begin to "test" or "balanc[e]" the policy against the constitutional rights of United States citizens. Stay App. 26 (quoting *Mandel*, 408 U.S. at 770). That is a remarkable proposition. It means that a President may adopt any facially neutral policy that *could* serve a

national security interest, even if he has admitted that he is actually pursuing an unconstitutional aim. For example, as the Government has acknowledged, under its reading of *Mandel*, the President may announce a desire to ban Jews, and then bar all immigration from Israel by citing national security concerns. Oral Arg. at 1:55:20 to 1:58:00, *IRAP* v. *Trump*, No. 17-1351 (4th Cir. May 8, 2017).

That admission alone demonstrates why the Government's position is untenable, particularly given that the Founders recognized that excluding immigrants of a dissenting faith was a prime means of establishing a religion. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2116-17 (2003). And it is not only the freedom of religion that is threatened by the Government's view of *Mandel*. Presidents could enact policies designed to further almost any unconstitutional aim by cloaking the policy in neutral terms and a national security rationale. A white nationalist could call for a whiter America, and then bar immigrants from Africa. An anti-gun activist could call for a halt on gun ownership, and then bar all imports from the countries that make gun components. So long as the Executive could offer a facially legitimate reason for each of these actions, courts would be powerless to intervene.

That is not the law. The Government's primary source for its view is a misguided analysis of the *Mandel* dissent. Specifically, the Government alleges (at 27) that the *Mandel* majority implicitly rejected any consideration of extrinsic evidence that a neutral rationale is shielding an unconstitutional purpose, because

Justice Marshall unsuccessfully urged a review of such evidence in his *Mandel* dissent. That is wrong.

In *Mandel*, there was *no* comparable evidence that the Executive had an unconstitutional ulterior motive for its action. The *Mandel* plaintiffs challenged the Executive's decision to deny a waiver of exclusion to a "revolutionary Marxist" professor. 408 U.S. at 756. The plaintiffs did not dispute that, without a waiver, the professor would be excluded under a statutory bar on the admission of communists. And they conceded the constitutionality of that statutory bar. *See id.* at 767. Their *only* claim was that the Executive's stated reason for denying the waiver was not sufficiently compelling to justify the harm to their First Amendment rights that would occur if the waiver was denied. *See id.* at 768-69.

Thus, when Justice Marshall invited his colleagues to "peek" behind the Government's stated rationale, he meant that they should analyze the facts on the ground to determine whether they really supported a need to exclude the professor. *Id.* at 778 (Marshall, J., dissenting). And his colleague's decision to decline that invitation signified nothing more than general judicial reluctance to second guess the foreign policy analysis of the political branches. That is very different from holding that a Court must ignore a mountain of evidence that the asserted rationale is mere camouflage for an unconstitutional purpose.

For that reason, at least in the face of an "affirmative showing of bad faith" like the one here, courts must be permitted to look behind a national security rationale in order to consider the constitutionality of an Executive Order. *See W.*

Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 637, 640 (1943) (explaining that the prohibition on government actions that make an "enemy of any * * * creed" applies even when the Government invokes a "national security" rationale).

2. The Establishment Clause Forbids The President From Enacting A Thinly Veiled Muslim Ban.

Once the Government's protestations of unreviewability are swept aside, there can be no doubt that the Order is unconstitutional. Under the Establishment Clause, the Government cannot "denigrate * * * religious minorities," "signal disfavor" toward a faith, or "suggest that [one's] stature in the community [is] in any way diminished" because of one's religion. *Town of Greece*, 134 S. Ct. at 1823, 1826. The Order runs afoul of those commands because an objective observer would conclude that its primary purpose is to fulfill the President' campaign promise to impose a "Muslim ban." *See McCreary Cty., Ky.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005).

The voluminous extrinsic evidence from both before and after the President's inauguration is virtually dispositive in and of itself. *See supra* pp. 3-6, 9-10. And that evidence is reinforced by the operation of the Order and the Government's own conduct since the Order was enjoined. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308. For example, the Order purports to pause immigration from certain Muslim-majority countries in order to give the President time to review vetting procedures. But the Order applies to nationals of the targeted countries, regardless of whether they currently live in a country with excellent vetting procedures. And it does not apply at all to long-term residents of the targeted countries who are not nationals.

Meanwhile, the Order pauses *all* refugee admissions worldwide, but cites only two examples of terrorist attacks attempted by refugees, one of which involves a refugee who entered the country as a toddler. And, while the Order asserts that both the travel and the refugee bans are necessary to prevent dangerous individuals from entering the country under the allegedly inadequate vetting procedures that are currently in place, the Government has readily agreed to permit the ban to remain enjoined until at least October in the event its stay request is denied.

A reasonable observer confronted with these facts, in the context of the numerous public statements from the President and his Administration, would inevitably conclude that the asserted neutral purposes of the Order are at best secondary and that the real aim is the enactment of a policy that is as close to the President's promised Muslim ban as possible. *See Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987) (finding an Establishment Clause violation where the "primary purpose" was religious, notwithstanding that the act's stated purpose was secular).

The Government tries to discourage this Court from that conclusion, observing that the policy does not ban *all* Muslims, and that it bans some *non*-Muslims. But the President may not evade allegations of religious discrimination by being over or under inclusive in his exclusions. So long as an objective observer would conclude that the President targeted this set of countries and refugees in general as an (albeit imperfect) means of excluding Muslims, an Establishment Clause violation has occurred. *See, e.g.*, *Stormans, Inc.* v. *Wiesman*, 136 S. Ct. 2433, 2437-38 (2016) (Alito, J., dissenting from denial of certiorari) (discriminatory intent

suggested where "the effect of the regulations in their real operation" meant that "the burden they impose" fell "almost exclusively on those" of particular faiths).

The Government also warns (at 30-31) that doubting the Order's stated rationale will embroil the courts in "judicial psychoanalysis" and endanger executive privilege. Hardly. The Establishment Clause inquiry turns on the apparent purpose and effects of a policy, not what is contained in the President's heart of hearts. The President's actual views towards Islam are irrelevant. What matters are his numerous public statements suggesting that Muslims are dangerous and should be excluded from this country, and his repeated suggestions that this Order is designed to further that goal. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) ("There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct."); *Edwards*, 482 U.S. at 595 (considering an act's "historical context" and "the specific sequence of events leading to [its] passage").

Nor does the District Court's consideration of the President's campaign statements somehow throw open the doors to judicial examination of every ill-considered statement made on the campaign trail and later retracted. The statements here were repeated, and they were public. There was no pre- or even *post*-inauguration retraction. To the contrary, the statement calling for a complete shutdown of Muslim immigration remained on the President's frequently updated campaign website until minutes before the Fourth Circuit oral argument. Whether campaign statements lacking some or all of these features would be probative is a

question on which reasonable minds might disagree; whether *these* campaign statements are probative is not. *Cf. Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982) (discussing ballot initiative campaign statements in equal protection challenge).

Finally, recognizing that this policy is unconstitutional does not mean that the President is forever barred from enacting policies that have a disparate impact on Muslims. *See McCreary*, 545 U.S. at 873-74 ("[W]e do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter."). As long as a rational observer would view the primary purpose of the policy as neutral, the President will encounter no judicial obstacle. Indeed, if the President had not used the first Order's public signing ceremony, numerous public interviews and speeches, and his Twitter account to make a series of barely veiled statements linking the Orders to his promised Muslim ban, this Order might have passed constitutional muster. And, even now, if the President were to publicly disavow his prior statements calling for a Muslim ban, and if he were to engage with Congress and the Administration in order to develop a response to the perceived national security threats, he would almost certainly be free to enact the resulting policy. The presumption of regularity remains; but the President must do something to demonstrate that he is entitled to it. *See id.* at 874 ("[A]n implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.").

C. The Order Exceeds The President's Authority Under § 1182(f).

The injunction may also be sustained for an alternate reason: The Order exceeds the President's statutory authority. Section 1182(f) authorizes the President to "suspend the entry" of "any class of aliens" whose entry he "finds * * * would be detrimental to the interests of the United States." This provision is broad, but it does not permit the President to ignore the limits contained in the text and structure of the immigration laws.

1. The President May Not Use General Grants Of Authority To Override Carefully-Reticulated Statutory Schemes.

It is a bedrock principle of statutory interpretation that statutes "must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The Executive may not use general grants of authority "to circumvent [a] carefully constructed statutory scheme." *Honeycutt* v. *United States*, No. 16-142, slip op. at 9 (U.S. June 5, 2017). Nor may he "transform the carefully described limits on [his] authority * * * into mere suggestions." *Gonzales* v. *Oregon*, 546 U.S. 243, 260-261 (2006).

The Court has stressed, in particular, that facially broad immigration statutes must be read in harmony with the INA as a whole. In the immigration context Congress "must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965). But "[t]his does not mean that * * * it can grant the Executive totally unrestricted freedom of choice." *Id.*; *see* U.S. Const. art. I, § 8, cl. 4. Accordingly, the Court has

often "read significant limitations into *** immigration statutes." *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001). In *United States* v. *Witkovich*, for instance, the Court held that the Executive's seemingly "limitless" authority to demand information of aliens was "restrict[ed]" to requests consistent with the "legislative scheme." 353 U.S. 194, 199-202 (1957); *see also, e.g.*, *Zemel*, 381 U.S. at 17-18.

These principles apply with full force to §1182(f). Congress enacted this statute to codify emergency restrictions that the President initially imposed during World War II. *See* Proclamation No. 2523, 55 Stat. 1696 (Nov. 14, 1941). Since then, Presidents have invoked it to bar narrow classes of aliens during exigencies Congress had not addressed. *See* Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 (Jan. 23, 2017), goo.gl/aTGqzC. For that reason, §1182(f) is best read as a grant of power that the Executive may use to manage an emergency, or to otherwise ameliorate a foreign policy crisis to which Congress has not yet responded. That understanding is consistent with this Court's recognition that the Executive may wield broader immigration authority during a time or war or national emergency, *see United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 546 (1950), or when swift action is needed to respond to rapidly changing circumstances, *see Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976).

But nothing in the provision's text or history, and nothing in this Court's precedent, suggests that §1182(f) can be used by the President to override the statutory scheme in response to circumstances for which Congress has already legislated. On the contrary, in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155

(1993), the Court carefully scrutinized an §1182(f) order to ensure it complied with "the text and structure of the [INA]." *Id.* at 171, 187.

2. The Order Repeatedly Subverts Existing Statutory Authority.

Under these principles, the Order cannot survive. Without pointing to any national emergency, or any changed circumstances at all, the President has invoked §1182(f) to nullify the INA's carefully constructed terrorism bar, subvert its structure, ignore the limits in §1182(f) itself, and contradict express text.

a. Section 1182(a)(3)(B) "establish[es] specific criteria for determining terrorism-related inadmissibility." *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). In "10 different subsections" that "cover a vast waterfront of human activity," this "complex provision" prescribes precisely when aliens may be excluded as terrorists. *Id.* at 2145-46 (Breyer, J., dissenting). That enumeration is exclusive; indeed, Congress enacted these specific rules precisely to bar the Executive from using terrorism as pretext to discriminate "on the basis of [an alien's] expression of beliefs." H.R. Rep. No. 100-475, at 163 (1987) (Conf. Rep.).

The Order flouts those limits. It excludes 180 million aliens as potential "foreign terrorists" because they were born in particular countries or seek refugee status. Order § 2(c); *see also id.* §§ 1(a), (f), 6(a). Section 1182(a)(3)(B), however, authorizes aliens to be excluded as terrorists only if, among other things, there is a "reasonable ground to believe [the alien] is engaged in or is likely to engage after entry in any terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(II). The Order does not attempt to make that or any other statutory showing.

Nor does the Order purport to address a particular terrorism-related exigency that Congress did not consider. In December 2015, Congress debated the same issues the Order identifies and responded by requiring nationals from the covered countries to obtain visas. *See* Pub. L. No. 114-113, div. O, § 203 (codified at 8 U.S.C. § 1187(a)(12)). That statute reflects a considered judgment that visa-screening procedures are sufficient; the Order renders that tailored solution superfluous.

b. The Order is also irreconcilable with the structure and policies of the immigration laws. The modern immigration scheme rests on the principle that an alien's admissibility must be based on his own "fitness to reside in this country," *Judulang* v. *Holder*, 565 U.S. 42, 53 (2011), not on "invidious discrimination" based on the alien's "race or group," *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.). Congress decisively eliminated such considerations when it repealed the national origins quota system in 1965. *See IRAP* v. *Trump*, No. 17-1351, slip op. at 121-124 (4th Cir. May 25, 2017) (Wynn, J., concurring). Every ground for inadmissibility now turns on an alien's *own* conduct or qualities, not those of a group to which he belongs. 8 U.S.C. § 1182(a). And nationality and race-based discrimination are particularly disfavored in light of Congress's affirmative decision to eschew the use of such criteria. *Wong Wing*, 360 F.2d at 719.

By its plain terms the Order violates this principle. It invokes a facially neutral provision, §1182(f), to ban nationals of six countries and all refugees because a handful have been suspected of terrorism. Order § 1(d), (f), (h). This inference—"that examples of individual disloyalty prove group disloyalty"—is the

essence of "discriminat[ion]." *Korematsu* v. *United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting). Nothing in the immigration laws sanction it. Nor has any prior President attempted it; every prior §1182(f) order has turned on an alien's own "objectionable conduct" or "affiliation[s]." 9 FAM § 302.14-3(B); *see IRAP*, slip op. at 124-25 n.11. (Wynn, J., concurring). Absent an overriding exigency, the immigration laws do not authorize this sort of undifferentiated dragnet ban.

c. For much the same reason, the President has also failed to comply with §1182(f) itself. That provision demands at least some rational basis for the "find[ing] that the entry of" the prohibited class of aliens "would be detrimental to the interests of the United States." 8 U S.C. § 1182(f); *see IRAP*, slip op. at 87 (Keenan, J , concurring). The Order justifies its ban solely by pointing to "conditions in the[] [covered] countries." Order § 1(d). Yet while those conditions might warrant limits based on *residence or travel*, they have no logical link to an alien's *nationality*. Order § 1(d); *see* Add. 61 (Order would "bar[] entry by a Syrian national who has lived in Switzerland for decades"). Likewise, the Order does not give any reason why *all* refugees *worldwide* would pose a threat "to the interests of the United States." And the President's extensive statements strongly indicate that the Order's "find[ings]" are a sham designed to disguise its unlawful purpose.

d. Finally, in many of its applications the Order contradicts express statutory text. Section 1152(a)(1)(A) provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's *** nationality." This specific, later-in-time statute plainly bars the

use of §1182(f) to deny the "issu[ance] of [immigrant] visa[s]" based on nationality. Order § 3(c). And it likewise prohibits the President from denying visas any *effect* because the visa-holder is the national of a banned country. *Id.* § 2(c). The Government has no plausible response; it has simply added a flagrant violation of the statute's text to its otherwise unlawful Order.

II. THE EQUITIES WEIGH AGAINST STAYING THE INJUNCTION.

Even if there were any chance that this Court would vacate the injunction, a stay would still be inappropriate because the Government has not demonstrated any necessity to upset a status quo that has existed for decades. "[T]he maintenance of the status quo is an important consideration in granting a stay," and "here it can be preserved only by denying one." *Dayton Bd. of Educ.* v. *Brinkman*, 439 U.S. 1358, 1358–59 (1978) (Rehnquist, J., in chambers)). Yet the Government devotes a mere *two* pages of its application to its attempt to show that it will be irreparably harmed unless the status quo is upended. That attempt fails.

Perhaps most notably, the Government no longer contends—as it did before the lower courts—that leaving the District Court's injunction in place will subject the Nation to imminent security risks. The Government offers no reason for this shift, but its own dilatory litigation tactics indicate that its current position more accurately reflects its sense of national security urgency. *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1317-18 (1983) (Blackmun, J., in chambers) (the Government's "failure to act with greater dispatch tends to blunt [its] claim of urgency and counsels against the grant of a stay."). Indeed, the 90-day period specified in the

first Executive Order has long passed, and the 90-day period for the second Order expires this week.

Whatever the case, the Government now relies almost exclusively on its claim that it is suffering an irreparable injury simply because a court has enjoined an Order issued by the President. The Government cites *Maryland* v. *King* for that proposition. 133 S. Ct. 1 (2012) (Roberts, C.J., in chambers). But that case involved an injunction of a state DNA collection program that had existed for years and led to scores of criminal convictions. 133 S. Ct. at 3. Those facts are hardly analogous to the Government's instant claim of irreparable harm from the injunction of an Executive Order that has never been enforced and would dramatically alter the existing immigration landscape.

In a series of cases that *are* directly on point, this Court has repeatedly refused to grant a stay merely because a lower court has enjoined a federal statute or executive action. *See, e.g.*, *Ruckleshaus*, 463 U.S. at 1315 (denying EPA's request to stay an order enjoining enforcement of portions of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")); *Commodity Futures Trading Comm'n* v. *British Am. Commodity Options Corp.*, 434 U.S. 1316, 1320 (1977) (Marshall, J., in chambers) (declining Government's request to stay an injunction of a new regulation). The Court has thereby recognized the wisdom of preliminarily enjoining federal actions that will significantly alter the status quo. *See Nat'l League of Cities* v. *Brennan*, 419 U.S. 1321, 1322 (1974) (Burger, C.J., in chambers), (issuing an injunction of amendments to the Fair Labor Standards Act pending

appeal, and noting among other things the "pervasive impact" the amendments would have "on every state and municipal government in the United States"), *stay continued*, 419 U.S. 1100 (1975).

These cases dictate the result here. The kind of "institutional harm" the Government alleges it will suffer from an injunction of its desired policy is not an irreparable injury that justifies permitting the dramatic change in immigration policy that a stay would immediately engender. *Cf. Texas* v. *United States*, 787 F.3d 733, 767–68 (5th Cir. 2015) ("[I]t is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect those [separation of powers] principles.").

The Government's other arguments for irreparable harm also fail. The Government contends (at 33) that "enjoining provisions [of the Order] that direct government agencies to assess" and update screening procedures "disables the government from taking action to protect the Nation." But it is unclear why the Government believes it is so helpless. Respondents have repeatedly explained, both at the District Court and at the Ninth Circuit, that the Executive is free to engage in any manner of study, review, upgrade or revision of its existing vetting procedures. The *only* thing the injunction prevents it from doing is engaging in those activities as an excuse for, or in order to perpetuate, the President's unconstitutional travel and refugee bans.

For that reason, there is nothing stopping the President from issuing a new order that (a) directs the agencies to conduct the same worldwide study and review

of vetting procedures described in Section 2(a) of the enjoined Order, (b) mandates the same review of refugee admissions described in Section 6, (c) requests a full set of reports as to the outcomes of these reviews, and (d) requires country specific upgrades to the vetting and screening procedures based on those reports. So long as the order did not use these provisions to justify or expand a veiled Muslim ban, they would survive judicial review.

Indeed, in light of the Government's stated national security concerns, its failure to issue such an order is mystifying. After the first travel and refugee bans were enjoined, the Government argued that it was perfectly consistent with that injunction to enact almost identical bans within the context of a new order. Courts agreed, holding that the constitutionality of the bans in the revised Order would have to be reviewed in their own right. *See Washington* v. *Trump*, 2017 WL 1045950, at *3-4 (W.D. Wash. Mar. 16, 2017).

The Government has offered no coherent explanation as to why it has not adopted a similar approach with respect to the enjoined vetting provisions. Instead, in response to questions about the status of the vetting review during oral argument before the Fourth Circuit, the Government asserted that it had asked the "Hawaii judge" whether he really "meant to enjoin internal governmental review procedures to look at vetting for these six nations," and the judge had said "yes." Oral Arg. at 7:32 to 7:55, *IRAP v. Trump*, *supra*. But that exchange did not occur. Before the District Court, the Government never referenced a belief that the injunction barred any review of "vetting for these six [targeted] nations." And the

District Court never confirmed such a misguided belief. To the contrary, in its preliminary injunction opinion, the District Court expressed confusion as to what, exactly, the Government thought it was barred from doing, given the Government's repeated statements that "most, if not all" of the internal procedures could "take place in the absence of the Executive Order." Add. 22.

In any event, it is Section 5 of the Order—which has not been enjoined—that directs the Secretary of State, Attorney General, and Secretary of Homeland Security to revise their vetting procedures. And the Department of State has proceeded with implementing such new procedures for visa applicants during the time Sections 2 and 6 of the Order have been enjoined. *See* C.A. S.E.R. 67-71; *see also* Br. of *Amicus Curiae* T.A. at 11-12, C.A. Dkt. No. 114. In fact, the President himself recently confirmed that his Administration is already engaged in "EXTREME VETTING." *See supra* p. 10 & n.3. Plainly, a stay of the injunction is not necessary to enable these activities to continue. *See Ruckelshaus*, 463 U.S. at 1317 (denying stay of order enjoining certain FIFRA provisions where EPA "remained able" to enforce FIFRA through other means).

In a final attempt to show irreparable harm, the Government contends that the District Court's Establishment Clause ruling "plainly carries the *potential* to undermine the Executive's ability to conduct foreign relations for the Nation." Stay Appl. 34 (emphasis added). Any such "potential" is a far cry from "a likelihood that irreparable harm [will] result from the denial of a stay," *King*, 133 S. Ct. at 2. In any event, the Executive's immigration power is "subject to important constitutional

limitations," *Zadvydas*, 533 U.S. at 695; the District Court's order could hardly inflict irreparable harm simply by enforcing those limitations.

The Government therefore fails to offer any reason it will be irreparably harmed if the Order is enjoined. By contrast, the harm to Plaintiffs and the general public that a stay would engender would be immense. This Court has made clear that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality op.). The harms are particularly severe in this case, where the Order will have profoundly negative effects on both Dr. Elshikh and the State of Hawaii, *see supra* pp. 13-18, and where history has already shown that the implementation of the travel and refugee bans will sew chaos and discord nationwide. *See Washington*, 847 F.3d at 1157; *see also* C.A. E.R. 152-156.

III. THE SCOPE OF THE INJUNCTION IS PROPER.

Finally, the Government offers several reasons why the injunction should be narrowed. None has merit. First, the Government claims (at 36) that section 2(c) is "indisputably valid" as applied to "foreign nationals with no immediate relatives in the country and no other significant connection to it." Not so. The Order denigrates Muslims and effects a policy of religious intolerance in all its applications; it is therefore unconstitutional as applied against anyone. Indeed, "the mere passage * * * of a policy that has the purpose and perception of government establishment of religion" warrants facial relief. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314. And

the identity of the Order's targets also has no bearing whatsoever on its invalidity under §1182(f).

Second, the Government contends (at 37) that Plaintiffs have not identified any cognizable injury from those subsections of sections 2 that "affect only the government itself." No such subsections exist. As noted, the provisions the Government refers to are procedures expressly designed to excuse and expand the President's unconstitutional ban. Order § 2(e); *see id.* § 2(a)-(b), (d)-(e). They therefore convey the same message of exclusion and discrimination as the ban itself; and because they were enacted "the same day" as section 2(c), and "function[]" as a part of the same seamless policy, "[i]t would be implausible to suggest that" they were not infected by the same discriminatory animus. *Lukumi*, 508 U.S. at 540.

Last, the Government argues (at 39) that the injunction should not have been applied "to all persons worldwide." But a narrower injunction would not fully redress Plaintiffs' injuries. The Order denigrates and burdens all Muslims, including Dr. Elshikh and subjects Hawaii's residents to the "universal sting" of discrimination from which the State's (1982).

The injury at issue in *United States Department of Defense* v. *Meinhold*, 510 U.S. 939 (1993), was entirely different; it did not involve a Government order that broadly burdened and denigrated citizens of a particular faith, but a simple request regarding records pertaining to the plaintiff himself. Nor did it implicate the Constitution's requirement for "an *uniform* Rule of Naturalization." U.S. Const., art. I, § 8, cl. 4 (emphasis added). Because of that requirement, ushering in a

fragmented system of individualized exceptions to the Order would work harms to the public interest in itself. *See Texas v. United States*, 809 F.3d 134, 187-188 (5th Cir. 2016); *Washington*, 847 F.3d at 1166-67.[5]

* * * *

In short, the Government has utterly failed to demonstrate any reason for this Court to stay the injunction. It has also failed to demonstrate any need for this Court to grant review of the injunctions barring enforcement of the Executive Order. Accordingly, the stay should be denied, and the related stay request and certiorari petition in *IRAP* v. *Trump* should similarly be rejected. Should the Court disagree, and decide to consider the merits of the injunctions, respondents acknowledge that it is necessary and appropriate to consider *IRAP* v. *Trump* and *Hawaii* v. *Trump* at the same time. Therefore, if this Court decides that it must grant review in *IRAP*, and if the Ninth Circuit has not yet issued a decision in this case, respondents acquiesce to the Government's alternative request to grant certiorari before judgment in this case, but request that the Court hear the cases in tandem on an expedited basis before its summer recess if the stays are granted.

CONCLUSION

The application should be denied.

Respectfully submitted,

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[5] The Government's contention that an injunction may not be issued directly against the President was never raised in the District Court and is waived. *See* C.A. Reply Br. at 29 (conceding that the issue was not raised). In any event, "injunctive relief against executive officials like" is certainly "within the court's power." *Franklin* v. *Massachusetts*, 505 U.S. 788, 802-803 (1992).

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CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29 5, I, Neal Kumar Katyal, a member of the Supreme Court Bar, hereby certify that one copy of the foregoing Response to Application for Stay was served via electronic mail and Federal Express on June 12, 2017 on:

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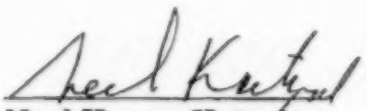

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